UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

RICHARD ROE and KATHERINE JINES, ET AL,	:	Case No. 2:21-cv-02655-AB Case No. 2-21-cv-00346-AB
Plaintiffs	:	
v.	:	Philadelphia, Pennsylvania
DEVEREAUX ADVANCED BEHAVIORAL HEALTH, et al	:	December 17, 2021
Defendants.	:	10:50 a.m.-12:09 p.m.

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE ANITA B. BRODY,
UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

THE COURT: All right. Now, would you like to introduce, Mr. Kenney, who you're representing?

MS. MOLDOVAN: Good morning, Your Honor, representing plaintiffs.

THE COURT: Okay. Annika Martin.

MS. MARTIN: Good morning, Your Honor.

THE COURT: And Jessica Moldovan.

MS. MOLDOVAN: Good morning, Your Honor.

THE COURT: And Jeffrey Lutsky.

MR. LUTSKY: Good morning, Your Honor.

THE COURT: And Cameron Redfern.

MS. REDFERN: Good morning, Your Honor.

THE COURT: Okay. Some of you are from Nashville?

MS. REDFERN: Our Nashville partner was not able to make it because of the sudden change, Mark Ellis, but Jessica and I are from New York.

THE COURT: Oh, okay. I'll allow you to stay anyway.

MS. REDFERN: Oh, thank you. I appreciate that, Your Honor.

MR. KENNEY: Your Honor, two associates from my firm might be attending as well, Mr. --

THE COURT: Well, where are they?

MR. KENNEY: They should be here by now.

THE COURT: Oh, okay. Oh, I should -- do you want me to wait until --

MR. KENNEY: No, it's okay, but just if they walk in.

THE COURT: No, I just wanted -- I just -- and you're all from New York?

MR. KENNEY: I'm from Philadelphia.

THE COURT: And you are?

MR. KENNEY: Joe Kenney, Your Honor.

THE COURT: Okay. And what firm are you from?

MR. KENNEY: Sauder Schelkopf.

THE COURT: What?

MR. KENNEY: Sauder Schelkopf.

THE COURT: Okay. All right. It doesn't make any difference, and you are from where, Mr. Lutsky?

MS. LUTSKY: Your Honor, Stradley Ronon.

THE COURT: Oh, okay. All right. Okay.

I usually reveal that my -- if you're from Nashville because my family is from Nashville, part of my family and my brother teaches at the Vanderbilt Law School and my sister-in-law is the solicitor general of the state, so --

MS. LUTSKY: I'll let our Nashville partner know.

THE COURT: What?

MS. LUTSKY: I'll let our national partner know.

THE COURT: Okay. I mean, you know, so I just always reveal it because people know that they're so active in the legal community there.

MS. LUTSKY: Absolutely.

THE COURT: And not as practicing lawyers, but in some kind of official capacity, well I guess a professor, yeah, it's an official capacity.

Okay. All right. The first issue we will -- I want to address Roe first. I think that that makes sense to me and let me -- I know that it's your motions to dismiss. At the same time I like to hear about what plaintiff has to say about their case. So I'm going to let you start to argue you call vicarious liability or they call vicarious liability. Would you like to tell me what your -- what the facts are in your case that they address in vicarious liability and then I'll understand their argument better.

Okay. Who's going to argue it?

MS. MOLDOVAN: I am.

THE COURT: Okay. Ms. Moldovan.

MS. MOLDOVAN: Would you like me to --

THE COURT: I don't care, whichever is more comfortable for you. I think -- that's fine. Can -- just

as long as I can hear you, if I can't hear you, I'll have to have you come up.

MS. MOLDOVAN: Oh, I can come up, Your Honor.

THE COURT: Okay.

MS. MOLDOVAN: Good morning, Your Honor.

THE COURT: Good morning.

MS. MOLDOVAN: So this case is about an institution that's supposed to care for the most vulnerable members of our society, who has autism, intellectual and developmental disabilities and special need (indiscernible), but Devereaux has repeatedly failed to do so.

As a result of that failure, my clients and the thousands of children currently in Devereaux custody has suffered unspeakable harms. They have been raped, sexually assaulted, physically and emotionally abused. The (indiscernible) and drugged. Many were explicitly told to keep quiet and (indiscernible) communicating with the outside world the plaintiffs (indiscernible) Rosey (ph) and Deborah Stack (ph) and Devereaux did not adequately pay, supervise or train.

So turning directly to the vicarious liability --

THE COURT: Well, let them -- I just want to know the facts from you that you believe are being

addressed by the viability motion. I mean, I'm sorry, the vicarious liability motion. I'm going to let the defendant tell me about their motion.

MS. MOLDOVAN: Sure. In terms of the facts, Your Honor, that we think are relevant particularly for vicarious liability --

THE COURT: Well, yes, go on.

MS. MOLDOVAN: -- so --

THE COURT: Well, first I have to find out -- I'll let you come back.

MS. MOLDOVAN: Okay.

THE COURT: I'm going to make believe this is in chambers, because I have to -- this helps me understand the argument better, and that's what I think all of you care about is that I understand it. So I'm going to ask you to sit down and then I'm going to hear the vicarious -- why he believes there's vicarious -- well, you can start. All right.

MS. MOLDOVAN: Sure. So just to give you more of the facts, Your Honor.

THE COURT: Okay.

MS. MOLDOVAN: So we're representing ten plaintiffs in addition to (indiscernible) and then one plaintiff Roe on top of the class. And for all of these plaintiffs they were either physically, emotionally or

sexually abused and they left Devereaux worse than when they went there, and continue to suffer from the trauma of their experiences to this day.

So to be clear and particularly relevant to the vicarious liability analysis, this is not a case about a few bad apples who committed a few bad acts. This is about institutional failure and a culture of systemic abuse and neglect.

The actions that Devereaux took came from the top. They centralized (indiscernible) they centralized decision-making system, qualities that affect all of the various facilities and the employees there took their charge from the top and they -- Devereaux was home, school, doctor, teacher. Devereaux did everything for these kids, and Devereaux had a responsibility to care for these individuals, care for these kids, teach them, clothe them, refer medicine and give medicine, restrain them, discipline. All of this is in the confines of what individuals at Deveraux were supposed to do for the people in their care.

THE COURT: Okay. Thank you very much. All right. Mr. Lutsky, I know understand what the plaintiffs are alleging and you can argue against that.

MR. LUTSKY: Thank you, Your Honor. Would you prefer we keep the mask on, is that your preference?

THE COURT: Yes.

MR. LUTSKY: Okay. That's fine.

THE COURT: I really believe that there is a pandemic.

MR. LUTSKY: Okay. Well, regard to the facts first before I address the legal insufficiency --

THE COURT: And just as long as I hear you that's all that matters and I hear you very clearly.

MR. LUTSKY: Okay. With regard to the facts first before we get to the legal insufficiency of the vicarious liability --

THE COURT: Yes.

MR. LUTSKY: -- let me just say, Your Honor said she wanted to talk about Roe. What I heard was that she represents individuals that have been raped or abused. She makes very clear in her Roe complaint, which is what I understand we're talking about first, that there is no actual injury being alleged by class. There's only a risk of heightened injury that she believes has harmed an in class member. There is no actual injury being alleged by class members in Roe.

Now, in Jines, there are individual plaintiffs with actual injuries they're alleging. But I just wanted to make that differentiation for the Court with regard to her factual presentation on what this is about.

With regard to the vicarious liability claims let me also observe another fact for you, just so we have this in context. Devereaux is a very large organization. It services about 25,000 individuals a year. They have very different needs medically, psychologically, very different social behavioral needs and operate in 13 states.

Because of the very different needs that their population presents, they have everything from residential treatment centers to group homes, psychiatric hospitals to community living groups, to out patient programs. Some people don't live at Devereaux at all, they just receive their therapy for social (indiscernible) needs on an out patient basis. So it's a very large organization.

It's been there almost a hundred years. I wouldn't say served 25,000 individuals a hundred years ago, but you do the math, there have been millions of people that have been serviced by Devereaux.

So to the extent that there is a presentation being made about the large member of the (indiscernible), I just wanted the Court to keep in mind the large population that services through 6, 7,000 employees across the country.

Now, with regards specifically to the vicarious liability claims. In both cases, but talking about Roe,

the plaintiffs seek to hold Devereaux liable vicariously for assault and battery. And in almost every case, by an unknown staff person, they don't allege who the perpetrator is, they have an unnamed (indiscernible) -- and these are staff people.

With regard to the assault and battery claims specifically it's Count VI in Roe and Count XVI in Jines. And Pennsylvania and almost all the states they list where these individuals in Jines reside (indiscernible) when they were serviced by Devereaux and where their class members may reside follow the traditional restatement analysis test for vicarious liability.

Which is, in order to be liable --

THE COURT: One second. I have that. Do we have that? I have that back in the chambers. You don't have a copy of that here, do you? The restatement. All right. I have one in my book. Just one second. I don't --

THE CLERK: Page 8 at the (indiscernible).

THE COURT: Page 8, okay. No, okay, all right. Okay. Because Pennsylvania -- certainly Pennsylvania restatement is various -- is very --

MR. LUTSKY: Exactly. And the test in Pennsylvania which is very, very common in these other states, which are also impacted here is that in order to

be vicariously liable, the abuse has to occur within the course and scope, it's and, and scope of employment.

And the issue is scope of employment. And Pennsylvania courts have consistently held that sexual and physical abuse of minors are so horrific, so outrageous, in violation of various criminal statutes and (indiscernible) certainly in violation of Deveraux's policies.

THE COURT: Well, the plaintiff didn't only allege sexual issues.

MR. LUTSKY: Well, most of their -- I would say in Jines, there are 11 plaintiffs and some of them raise sexual issues, some physical and some both. And in the class action while the representative Roe alleges physical abuse, the class is on behalf of both --

THE COURT: Well, we're not up to the class yet.

MR. LUTSKY: Okay.

THE COURT: Right now we're only up to Roe, so let's argue to me on Roe.

MR. LUTSKY: So the question about abuse is, was it done during the scope of the employment of the abuser. And Pennsylvania courts have consistently held that particular abuse of minors is not in the course and scope of employment because it's so outrageous, because it could not have been done for the benefit of the employer. It

was done for the personal gratification of the employee.

And Your Honor reached this exact same result in the (indiscernible) case, which I personally (indiscernible) case --

THE COURT: Well, that was a little different.

MR. LUTSKY: Well, it was a sexual abuse case, but you went through in that opinion very carefully all of the authorities regarding scope of employment with regard to abuse of minors.

THE COURT: But that was against Penn State, wasn't it?

MR. LUTSKY: Yes, it was.

THE COURT: And so he didn't work for Penn. This was not in the context of Penn State, was it?

MR. LUTSKY: He didn't work for Penn State, but the abuse occurred there and it was alleged --

THE COURT: Well --

MR. LUTSKY: -- that Penn State facilitated that because it permitted him to bring minors into the area.

THE COURT: Yeah, but this has nothing to do with this. This is actually people who are -- work for Deveraux and in the context of Devereaux.

MR. LUTSKY: Yes, but there are many, many other faces in Your Honor's opinion in that Doe case, (indiscernible) authorities failed to care for. For

example, the BM versus Northeast (ph) --

THE COURT: You're expecting me to be consistent, is that what you're saying?

MR. LUTSKY: It would be appreciated if it were to happen. And, in fact, the decision that you reached there it is a very careful decision, despite the issue (indiscernible) it goes over the cases very carefully.

There are many cases we have cited in our brief, literally dozens in which courts have said that abuse of minors is not done for the employer's benefit, so therefore, it cannot be within the scope of employment.

For example, we cite to the BM versus Northeastern Educational Unit which was a case about educational institution in the Middle District of Pennsylvania. In Pennsylvania, we cite the Sanchez v Lochness (ph) which is a daycare abuse of minors on premises. There are a number of clergy cases we cited to as well.

THE COURT: That's the -- those are the cases that come to mind.

MR. LUTSKY: Yes, and there's a litany of them. And Pennsylvania has always adopted scope of employment, course and scope (indiscernible) agency and has consistently held the abuse of minors is not done in furtherance of the employer's business and therefore falls

outside as a matter of law, not as a matter of fact, but as a matter of law, falls outside the course and scope of employment.

Now, the primary response from plaintiff on this --

THE COURT: Well, I'll let them come back and you don't have to tell me what their -- I'll let you go back and forth because that's most important to me.

MR. LUTSKY: Okay. What I was going to interject and then, Your Honor, whatever you decide is fine, they urge two different --

THE COURT: I don't want you to argue for them.

MR. LUTSKY: Okay.

THE COURT: So I want to hear what they have to say and then you can come back and argue against it, I have no problem with that.

MR. LUTSKY: Okay. All right. Well, like I said we urge the Court to follow the consistent practice in Pennsylvania on the state's for course and scope of employment under matter of law.

THE COURT: All right. I'm just going to let you do -- and then I'm going to ask plaintiff come back and argue against your contentions as to vicarious liability, that's -- if you were in chambers, I would just go back and forth but we're not.

MR. LUTSKY: Sure.

THE COURT: Okay? All right. Would you like to argue?

MS. MOLDOVAN: Yes, Your Honor.

THE COURT: Well, the impact, basically the impact of the restatement.

MS. MOLDOVAN: Sure, Your Honor. We offered three different theories of liability. We have the (indiscernible) probation, the traditional scope of employment (indiscernible) aid of an agency.

Regardless of which approaching take, so say it's the scope of employment, facts matter. That's exactly what our colleague (indiscernible) but there are cases that show that sometimes the actions are within the scope of the employment and cases where there are not. That's precisely why there are (indiscernible) cases for example that come out in opposite ways. And you can be completely consistent with respect to John Doe 6, the Penn State (indiscernible) case.

In that case, there was no connection, as he says, Your Honor, between Penn State and the abuse that occurred. So --

THE COURT: Why is that material in the context of vicarious liability? Why is that essential in the case of vicarious liability, in the context of the restatement?

MS. MOLDOVAN: Right, because vicarious liability is ultimately about when it is appropriate to hold the employer liable for what the employee does. And in that case, there has to be a connection between the (indiscernible) and the harm.

In the case of John Doe 6 v Penn State that connection did not exist. But you have (indiscernible) he could have taken, unfortunately, could have taken John Doe 6 anywhere to perpetrate the abuse. He happened to take John Doe 6 to Penn State.

The other (indiscernible) when he did that, he wasn't -- John Doe 6 lived there, that's not true of the people at Devereaux. The kids at Devereaux live there, they depend on the people there to prescribe them medication, to teach them. It's a completely different case.

THE COURT: Well, why is it important that it's a different case? I mean, in what way -- I mean, I know what I wrote in Roe -- I mean in Sandusky, but why is it material to this -- to your analysis of vicarious liability that this person is not -- that Sandusky was not working for Penn State, why does it matter?

MS. MOLDOVAN: Because it could not be within the scope of his employment, if he wasn't actually working there.

THE COURT: Okay.

MS. MOLDOVAN: And that's not the case for all the perpetrators in our case. They were working for Devereaux. They were -- and when they were perpetrating abuses, they were acting in their capacity as Devereaux staff. That's a key difference between these two cases.

Another difference is the fact that the kids at Devereaux are captive at Devereaux. They live there, they sleep there, they get their education there, they get their medication there. Again, that's not the case with John Doe 6, that's not the case in the daycare context, that's not the case in a church context even.

This is a particular institutional case and in that way, it's separate from many of the other vicarious liability cases.

THE COURT: And under the jurisprudence of vicarious liability why is that material? In other words, what does -- does vicarious -- the Pennsylvania view of vicarious liability, why does it matter and what is the essence of that doctrine in -- relating to this case?

MS. MOLDOVAN: The essence of that doctrine is when is it appropriate to hold the employer liable for the employees' actions. That's fundamentally what vicarious liability does that.

Now, if -- it definitely takes the place -- the

time and place occurs at Devereaux. Defendants do not dispute that. What they go after is whether it's within the scope of the employment. And whether or not something is within the scope of the employment is whether or not the person is acting in their capacity, in their job, as they perpetrate the abuse in the context of doing their job, and that's precisely what happened.

For someone at Devereaux to take (indiscernible) to restrain someone to the point where they get bruises and they're injured, the restraining is part of the job. It's just like a case of excessive force. A police person can use force, but they can't use excessive force. And once they use excessive force, they're acting within the scope of their job, they just exceeded their authority and perpetrated abuse.

THE COURT: Okay.

MS. MOLDOVAN: The main thing to take away, but facts matter in this situation and the fact that Deveraux are such that they were acting within the scope of their job when they perpetrated the various types of abuse.

THE COURT: Okay. All right. Thank you.

Let me see, do you have anything to respond, or should I take everything that was said and simply weigh it myself. Thank you.

Is there anything on vicarious liability that

you wish to address that you haven't addressed before?

MR. LUTSKY: The only thing I would say is what was left out of that discussion, which is an essential element of vicarious liability is that they (indiscernible) has to be done to further the employer's business. It is not done for personal gratification of the employee, it has to be done to further the employer's interest. And here --

THE COURT: In other words, if it doesn't further the employer's interest, it could never be -- it can never be --

MR. LUTSKY: That's correct.

THE COURT: Is that your position?

MR. LUTSKY: That's correct.

THE COURT: Okay. All right. I just want to know if that's your position. Do you believe that that's accurate?

MS. MOLDOVAN: No, Your Honor, it's not.

THE COURT: Okay. I'll weigh that.

MS. MOLDOVAN: And if I could just add one final thing on vicarious liability. In order for us to understand the full scope of the employee's jobs, we need discovery. We're at the pleading stage. We understand that -- as I said, there were teacher, doctor, you know, parents, but to understand precisely what happened just

like in the Barry (ph) case, which is a Pennsylvania case, we need to know exactly what it was (indiscernible) and we can get that with discovery.

THE COURT: Well, that also would be an argument on Jines.

MS. MOLDOVAN: Yes. Yes, Your Honor.

MR. LUTSKY: Your Honor, I'll read from your own opinion. And I'm not arguing that the facts are exactly the same, but your analysis of vicarious liability doesn't differ case-to-case. And we --

THE COURT: But I may have gotten smarter in the last couple of years, I don't --

MR. LUTSKY: You're brilliant here, Judge. You were brilliant (indiscernible) which is restatement (indiscernible) 228. So we're quoting the restatement.

THE COURT: Okay. I can read that, yeah.

MR. LUTSKY: And the restatement says, conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits are too little actuated by a purpose to serve a master.

And what these cases consistently hold is, people that abuse minors are not acting in the furtherance of the employer's interest. It violates the law. It violates the employer's policies, it's completely contrary

to interest and that's why these cases consistently hold and we've cited dozens of them.

THE COURT: What year was that case, I don't remember?

MR. LUTSKY: It was 2013.

THE COURT: Okay.

MR. LUTSKY: The law has not changed in Pennsylvania.

THE COURT: All right. Thank you. You know, there are sometimes I find I was wrong.

Okay. The next issue is assault and battery. Do you want to explain what these -- well, let -- I'm going to ask you to argue about assault and battery in Roe.

MR. LUTSKY: In Roe, okay.

THE COURT: Or Jines, they're both the same.

MR. LUTSKY: Well, in both cases the assault and battery is presented in the complaint. And in both cases it should be dismissed.

We pointed out in our motion to dismiss that a battery requires an offensive touching. If you haven't touched a person, you haven't committed a battery. Now, obviously Devereaux as a foundation, a non-profit foundation it doesn't touch anybody.

Here, they want to hold Deveraux liable for the

battery committed by the employees. One argument they raise is vicarious liability, which we already talked about, but they also raised an argument in response to our motion which I don't believe is pled anywhere in the complaint, but in response to the motion they argue that there also is direct liability for battery.

THE COURT: Let me -- well, I'm going to let them argue their own case. So I don't want to hear you telling me what they argue. Let me hear from them and then I'm going to let you come back.

Okay. All right. Why don't you tell me what you believe that you have a claim for assault and battery that should survive?

MS. MOLDOVAN: So we've alleged that Devereaux created a culture of prominent abuse where kids were either abused or waiting in fear for the next time that they would be abused.

Contrary to what the defense has argued, battery -- all that is necessary for battery is that the actor intent to cause the other directly or indirectly to come in contact with a form and substance in that manner which would reasonably regard as offensive.

And that is exactly what Devereaux did by virtually not putting policies in place to protect the students and kids in their care.

So to commit assault and battery, an institution does not need to physically touch anyone, nor do they have to desire to do harm. That's a misunderstanding of the definition of battery.

Sure, that's often what happens when you think of battery, someone touches someone else, but that's actually not -- not what is actually required under the law for a battery.

To not appropriate train, pay or supervise its employees and by knowingly failing to implement policies Devereaux all but guaranteed that abuse would occur and that's what intent -- that is tantamount to intent under the law.

For (indiscernible) -- to (indiscernible) a legal person would know that based on the circumstances abuse is substantially certain to occur. That is what Devereaux did by placing the kids in the position that they did.

So, Your Honor, we pled facts that give rise to battery, to assault and battery. That's what we have to do in our complaint. So to the extent that defendants say we haven't pled this theory of liability, all we have to do is plead the fact that gave rise to this legal claim and that's what we have done.

So again, we understand that an institution did

not punch any of the kids. We know, you know, how things work. We're saying the position that --

THE COURT: You're saving derivative -- what you're saying is derivative assault, if you will; is that correct?

MS. MOLDOVAN: Exactly. And the people who did the drugging, we're not bringing it against the perpetrators, we're bringing it against the institution that engages in that type of behavior, that has its employees essentially drug kids into a stupor. And there are cases that support that.

So we have the Bardelodi v Gracepoint (ph) case where a motion to dismiss was denied, where the plaintiffs sued a hospital for battery on the basis that she was medicated against her will. That was not against the individual that gave her the medication. That case was against the institution where that occurred.

Same thing in Freder v Iolaff (ph). Again, this is where the institution places someone in a position to come into an event of contract. They don't have to be the ones that actually (indiscernible).

THE COURT: Okay. Thank you. Okay. Mr. Lutsky.

MR. LUTSKY: Thank you, Your Honor. We are in disagreement on what assault and battery is. Assault and

battery requires, and we cited many cases on this in our brief. Two elements, there has to be an offensive touching and secondly, there has to be an intent to harm.

THE COURT: It's not an assault also, it has to be a touching?

MR. LUTSKY: No, assault and battery. You cannot battery by omission. That's not a claim. That doesn't exist, that's what they're arguing, because we didn't have a policy somebody was battered, therefore we battered them. That doesn't make any sense.

In fact, there is cases cited in our brief, the Solomon case in Florida, the Forth v McCracken (ph) case in the Eastern District, you have to have an offensive touching. You can't have assault and battery by omission.

So the basic elements of the claim are not met. And there's no argument here that Devereaux intended any harm to the plaintiff in either of the cases. So the assault and battery cases should be dismissed as a matter of (indiscernible).

THE COURT: Okay. Thank you. All right. The third, intentional infliction of emotional distress and that is Title 9; is that correct?

MS. MOLDOVAN: We have two claims, the Title 9 claim and the separate intentional --

THE COURT: Yeah, well, that's right. Why don't

you all give it to me. I mean, why don't you tell me what the facts are, I'm sorry.

MS. MOLDOVAN: Regarding (indiscernible)?

THE COURT: I don't care.

MS. MOLDOVAN: So, yeah, I'll start with the Title 9. So, Your Honor, might be more familiar with the -- there are two type of claims, two type of Title 9 claim. There's pre-assault and post assault claims.

The traditional more type of common of Title 9 claim is a post assault claim. That is not the type of claim that we're bringing. We're bringing what's known as a pre-assault claim, which requires a showing that an institution had a policy of deliberate indifference to past sexual misconduct, that heightened the risk of sexual misconduct at the institution which resulted in the assaults that plaintiff (indiscernible) seek.

Now, this is precisely the type of claim for a situation like the one that we have. And in every -- every circuit that considered this type of claim has found this to be a viable Title 9 theory, and it's completely consistent with Debnor and Davis (ph), the leading Supreme Court cases on this issue.

Now, for this type of claim the way that you show it is that the institution was aware of series of sexual misconducts, and essentially did nothing about it

or didn't act appropriately in response to it.

And in our complaint, we have alleged more than just a nebulous culture of abuse, which is what the defendants say. We have shown at least seven lawsuits since 1996, one yielding $50 million in punitive damages, two exposes and uncovered (indiscernible) kids have been abused. This is not some, you know, nothing to the paper, this is the Philadelphia Enquirer that uncovered scores of abuse.

If it weren't enough to become known to the facts of this case because they true are egregious, so we have the exposes and there's the lawsuits. And every other circuit that has addressed this has found with that type of information, one thing that (indiscernible) the pleading stage on a pre-assault (indiscernible).

So we just want to be clear about two different things in the context of a pre-assault claim. One is that in this case, we explicitly alleged educational detriment, that the students were affected by what had happened. Moreover, it's clearly severe enough to give rise to educational detriment.

What we have here are not just allegations of teasing or something like that, we have allegations of sexual assault and rape. So in addition to the case law supporting the idea that this is sufficient under the law,

social science in the last 10, 15 years have made it abundantly clear that chronic abuse can give rise to the inability to learn. We've alleged that in our complaint as well.

And finally, all but one of the plaintiffs allege that staff members abused them. That's a critical important difference in something that I believe the defendants gloss over.

When someone in the position of authority abuses another, the case law confirms that that's different than care to cure abuse. And Jester (ph) says it explicitly, no one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher. And that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system. That's what we have here. That's why a Title 9 claim is appropriate.

We have pled allegations that far exceed other cases where they haven't found a pre-assault claim, and further this is the tip of the iceberg. This is what know of publicly, that there are newspapers that are (indiscernible) this. There is so much more that we don't know and that's why we need to go into discovery.

THE COURT: Okay. Thank you. Mr. Lutsky, would you like to argue against this?

MR. LUTSKY: Yes, Your Honor.

THE COURT: All right. Would you like to argue in favor of your motion?

MR. LUTSKY: Thank you. Let me first point out that there is no Title 9 case claim pled in Roe, it's pled in Jines, but it's not pled in Roe.

THE COURT: Is that right?

MR. LUTSKY: Yes.

THE COURT: Intentional infliction in Roe?

MR. LUTSKY: There's no Title 9 case pled here?

THE COURT: Oh, is that right? Yes, because the other you need it for jurisdiction.

MR. LUTSKY: Right.

THE COURT: Okay.

MR. LUTSKY: So in fact, in Jines for several reasons plaintiffs gives the only basis for subject matter jurisdiction of this Court for three of them actually, Jane Doe 6, John Doe 1 and 2 and Johns, if there's no Title 9 claim if that's dismissed, there is no subject matter jurisdiction.

THE COURT: Well, there is on certain plaintiffs.

MR. LUTSKY: Yes, but not on those three.

THE COURT: Okay. I understand that, but the issue is whether or not there's a Title 9 claim.

MR. LUTSKY: Right. So in Johns, on the Title 9 claim -- first, let me say that they've acknowledged they can't state the traditional Title 9 claim because they can't plead or prove that anyone at Deveraux had actual notice of the propensity for abuse before the --

THE COURT: Well, how about -- not only intentional, how about reckless disregard?

MR. LUTSKY: But that's not a Title 9 claim.

So with regard to Title 9, what they're arguing now and this is what counsel just argued, they argued that while they can't state a traditional Title 9 claim because they don't have actual notice before the abuse occurred to those plaintiffs, they find a state where they call pre-assault claim.

And the pre-assault claim they're arguing is that because of these -- what they claim to be lack of policies or (indiscernible) of abuse, that they don't need to show notice to Devereaux.

Now, let me say that the Third Circuit has not adopted this pre-assault theory. This (indiscernible) case has to --

THE COURT: But they haven't found anything -- I mean, they -- we -- they've been silent on it, we don't know what --

MR. LUTSKY: Yes, it hasn't been tested in the

Third Circuit.

Now, a minority of courts have permitted this pre-assault theory but still requires a showing of deliberate indifference. And here, you don't have facts showing notice and deliberate indifference.

For example, the articles that she cited in the newspaper, this was published in August of 2020. These claims in Jines, and that's the only case where there's a Title 9 claim they go back 10, 20, 30, 40 years or more. They're not notice of anything, the fact that there was a case, you know, in 2018 or a case filed in 2020. That's not notice to Devereaux of an abuse issue that happened to one of their plaintiffs they allege in 1976, in 2003, in 1994, 1987. Those are after the fact instances, they're not notice.

Secondly, even in the pre-assault theory jurisdictions, you have to show that the abuse or discrimination or harassment or whatever you want to call it, had a severe impact, severe impact, it's a very high bar when you say this, on their educational activities.

Now here, the only thing that's been pled is that there was an impact on their educational activities, but there are no facts pled about that at all, just a conclusory statement.

And the cases cited by, and this is really

important, the cases cited by the plaintiff on this issue that show that there's a presumption of a severe impact when it's teacher on student abuse, they have no application here at all.

None of these cases allege that a teacher abused anybody, not one. None of them. What they allege is that a staff member, these are people who are not part of the educational program. They are people who are in the health and well being and a clinical and medical program of Devereaux, they have nothing to do with the educational program of Devereaux.

So all these teacher on student cases they rely upon are completely irrelevant because the school has the same teacher (indiscernible) where anybody can enter into the educational progress.

So Devereaux takes care of not only an educational need for these students, to the extent they live there, and not everybody does. Many -- and I don't you don't want to talk about the class yet, but many of the so-called members of the class don't live there. But Deveraux also primarily takes care of their medical, psychological, behavioral needs through a psychiatrist, clinicians, doctors, nurses, and that's where these staff members work and that's what their function is, is to work with them. They're part of the health and well being

team, they're not part of the educational team.

So there's been no showing in this pleading that their educational activities were disrupted. Now, I know that counsel talked about, you know, rape and abuse, but in Roe, for example, we had a representative who claimed that he was punished with loss of some food and someone covered his eyes.

In some of the Jenix (ph) cases, some of them, it's physical only and it's not sexual at all. So here --

THE COURT: You're arguing that it can't be abusive enough so that it's --

MR. LUTSKY: You have to plead what the specific educational impact was, and that wasn't done here. All they said was anti (indiscernible) traditional activities. But the courts in this area have basically said that even severe mental distress, severe emotional distress does not satisfy it. It has to have a direct impact under educational activities and there's disruption of those activities.

I'm not saying it couldn't (indiscernible) happen, there could be cases where it would, but I'm saying it has not been pled.

THE COURT: Okay.

MR. LUTSKY: And because it hasn't been pled, it should be dismissed because it doesn't satisfy the

elements of the Title 9 claim, even a pre-assault.

THE COURT: Okay. Thank you.

MS. MOLDOVAN: Your Honor?

THE COURT: Yes, you may respond.

MS. MOLDOVAN: A couple of responses, Your Honor. First with respect to the teacher/student distinction, the (indiscernible) have not cited a single case whether the distinction between whether or not someone is labeled a teacher versus someone labeled a staff makes any difference in the Title context, but I have not found one.

Whether someone -- the question is whether or not the person is in the position of authority, and in that case, Devereaux is covered.

The second case I want to mention is in terms of -- when the Philadelphia Enquirer article came out, and whether or not that put Devereaux on sufficient notice. The Philadelphia Enquirer article that came out talks about lawsuits going back to the '90s and '80s. Devereaux was on notice of those lawsuits I assume, because at least one had a $50 million punitive damage award.

So to say that the Philadelphia Enquirer is the only time that Devereaux could have gotten any sort of notice is to ignore many of the facts alleged in the complaint, as far to ignore the reality of what the

institution should know about or knows about and (indiscernible) prove (indiscernible) in discovery. But the lawsuits go back to the '90s, at least the '90s, and the Philadelphia Enquirer article mentions another expose in 1985 about issues with Devereaux staff. So that is far before 2020.

In terms of the severity of the harm, a few responses. First, we have explicitly alleged that it was severe. Defendants may not believe that, but that's what we have alleged.

Second, the idea that only -- that mental anguish is not enough, defendants cite one case where the Court found that mental anguish was not enough. That is not in keeping with the majority of case law, which has found that mental anguish not only is enough, but obviously is going to result in something as severe as a rape or a sexual assault.

And again Your Honor is correct that Title 9 does not (indiscernible), it's only in the Johns context. And so there are numerous cases where Courts have found that the assault itself is what gives rise to the educational detriment.

There's Doe C v The Career Tech Center, which is from the Middle District of Pennsylvania and that involved abuse of a student and they did not -- the Court did not

look for additional educational (indiscernible) beyond the abuse. NDB v (indiscernible) Christian School (ph) from the Western District of Pennsylvania, a 9-year old was sexually assaulted on a bus. The Court didn't look for further educational detriment. So --

THE COURT: The one thing I haven't -- okay, I understand your argument there. The -- I did not -- I don't want to preclude you from arguing intentional infliction of emotional distress in Roe that is now the Title 9 claim.

MS. MOLDOVAN: Certainly I can address the IIED.

THE COURT: That's right.

MS. MOLDOVAN: Yeah, in both cases. All right. So our argument for IIED is that by not implementing policies to prevent abuse in the phase of repeated reports of abuse of children with disabilities Devereaux's comments were extreme and outrageous.

For IIED the type of abuse doesn't matter, whether or not it was emotional and sexual or physical, which is why it covers Roe, who alleges physical abuse.

So the first thing I'll say about the IIED claim is we have to -- the law takes into account of the victims. Here we have kids with disabilities. If there is ever a case where IIED is appropriate, it's this case.

And we're not just talking about the underlying harassment, it's the institutional betrayal aspect that gives rise to the IIED.

These kids depended on the institution to keep them safe. So this is completely separate from the perpetrators who actually abused the kids. This is about the institution's failure to respond to those kids and to be deliberately indifferent.

So two things about that, the standard for IIED is not really intentional infliction but also reckless infliction. That is the standard of Pennsylvania law, Taylor v Albert Einstein, a 2000 Supreme Court in Pennsylvania decision that (indiscernible). The standard was recklessness.

There are multiple cases that have found that where an institution fails to investigate and fails to follow-up on egregious harms the institution can be held liable for IIED.

So when we talk about (indiscernible) which is where the institution failed to follow up on reports on allegations of abuse. But there have been other cases that have found institutions liable for IIED in Pennsylvania.

So Doe v Moravian College is a 2021 case from the Eastern District of Pennsylvania. And it held that

the college's response to the rape of a student rised to the level of IIED because leadership at the college learned that two of its students raped another student and the college took no action. And in addition to taking no action, the school discouraged the individual from coming forward with a complaint. And the Court found that that would clearly survive a motion to dismiss an IIED claim.

The same was found was in NGJ v School District of Philadelphia, also an Eastern District of Pennsylvania case from 2017 again denying a motion to dismiss when the institution failed to follow-up on severe allegations of abuse.

That's precisely what we have in both (indiscernible) Roe and the Jines case.

THE COURT: Okay. Okay. Mr. Lutsky.

MR. LUTSKY: Thank you, Your Honor, if I could just finish up first on the Title 9 in response to --

THE COURT: Oh, sure.

MR. LUTSKY: -- counsel's argument.

THE COURT: Of course.

MR. LUTSKY: Title 9 is an educational statute. So the question is not about whether the severe mental anguish, we're not arguing that it creates severe mental anguish we understand that. The question is, does it have a severe impact on your educational activities. What is

the connection to education as opposed to the general well being?

Noe one is arguing that they didn't allege severe anguish. But there are many cases that we've cited in our briefs that hold if there's not a direct connection pled, facts pled to their disruption of their educational activities it's not a Title 9 thing. It might be something else, but it's not a Title 9 thing. And that was our Title 9 argument.

Now, with regard to IIED and negligent infliction. First I want to make clear we didn't seek to dismiss the negligent infliction claim, so I'm not sure why you're --

THE COURT: So as of record, you're not moving --

MR. LUTSKY: Not negligent, intentionally yes.

THE COURT: Okay.

MR. LUTSKY: Not negligent infliction.

THE COURT: Is that --

MS. MOLDOVAN: Your Honor, I'm only addressing intentional infliction.

THE COURT: Okay.

MR. LUTSKY: All right. I thought I heard arguments about what we should have done and should not have been --

THE COURT: No.

MR. LUTSKY: -- so that's why I thought they were arguing negligent --

THE COURT: No.

MR. LUTSKY: -- and we're not challenging that.

But with intentional infliction it's very clear from the cases that there has to be conduct of the institution as distinguished from the abusers. The institution, which is outrageous, so outrageous that it would commit a claim for intentional inflict of emotional distress.

And contrary to counsel's argument we have cited a number of cases which have held that claims like this while they may state intentional infliction claims against the abuser, they don't state them against the institution, because you have to differentiate the conduct.

For example, in Doe v Allentown School District, which is an Eastern District case cited in our case, 2007, again case involving sexual harassment and assault. The Court said it is generally only the perpetrator is considered liable for an intentional infliction claim.

The Court went on to say these results are not surprising because the tort is designed to provide compensation only for outrageous acts done for the purpose of causing emotional distress. And in the context of

sexual assault, typically the assailant alone intends the harm and they dismissed the IIED claim against the school district, the institution for the alleged assault by its employee. And that's what we have here.

We don't have outrageous conduct by the institution. We have outrageous conduct by the employee. And the cases hold there's a very, very high bar for outrageous conduct. For example, there are cases that even say (indiscernible) is not outrageous. There are plenty of cases we cited involving sexual harassment and assault and battery that say the institution did not commit outrageous conduct.

And they want to argue outrageousness by omission again. Not that we did something, but that we should have done something. And to me, that properly falls into the negligent infliction claim which we're not arguing. They stated it, we'll defend it. But it doesn't fall into the intentional infliction of emotional distress by (indiscernible).

THE COURT: Okay. Thank you. Do you want to respond?

MS. MOLDOVAN: Yes, Your Honor.

THE COURT: Mr. Lutsky, these are ones that I propose that I get addressed in the -- in this oral argument, but I will allow you to argue any other that you

can think would be helpful, but it's not important for you to argue, I can go on the papers. I mean, that's what I've -- these are the things that I wanted to hear about.

MR. LUTSKY: Sure.

THE COURT: Okay.

MS. MOLDOVAN: All right. Two quick responses, Your Honor. First, we know that it's about the institution. We didn't even name the perpetrators. So our point is about holding the institution liable. That doesn't undercut our claim, that is our claim. It's the nature of our claim that the institution did not do what it should have and did not do -- more than that, it was reckless.

So the standard for IIED is one by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another, is subject to liability for such emotional distress and bodily harms are results for such bodily harm.

So the standard under Pennsylvania law is recklessness. What Devereaux did was reckless.

THE COURT: Okay. I understand your argument.

MS. MOLDOVAN: Thank you, Your Honor.

THE COURT: Okay. Is there anything -- I really don't need argument on the others, on the individual ones. Do you want -- do you --

MR. LUTSKY: No, I would like to be heard on the class action.

THE COURT: Okay. The only -- I usually -- that's such a wide -- I usually like to do that by a motion to certify or as opposed to -- there's no motion before me and I'm very reluctant to have you do that. If you want -- if you insist on it, I will of course hear.

MR. LUTSKY: Could I explain why I think it's important in this case?

THE COURT: Okay. Sure.

MR. LUTSKY: And --

THE COURT: And are you ready -- prepared to --

MS. MOLDOVAN: Yes, Your Honor.

THE COURT: Okay. All right. You may go forward.

MR. LUTSKY: I'll try to shorten that argument up (indiscernible) argument, you know, all right, so.

THE COURT: Well, that's what I was thinking.

MR. LUTSKY: All right. But I will try to shorten it up.

THE COURT: Yeah, and I'll know more about the case if I allow it to go through to discovery, so.

MR. LUTSKY: I acknowledge, Your Honor, that it is the exception and not the rule.

THE COURT: Sure, in a motion to dismiss that's

exactly right.

MR. LUTSKY: But there are cases in district courts around the country including in Pennsylvania, both Eastern and Western which have dismissed and struck class action allegations even at the pleading stage.

THE COURT: Are you really expecting to get that from me? You've been practicing law here.

MR. LUTSKY: Well, let me explain why I think it's appropriate here and maybe I'm fighting it, but I don't feel bad about it. I'd like to at least --

THE COURT: Yeah, well, of course.

MR. LUTSKY: The test is at the pleading stage is there any amount of discovery that is going to enable and to certify this class.

THE COURT: Okay.

MR. LUTSKY: In our view, there is no discovery, no amount that would enable them to certify this class. But failure to address it now will exponentially increase the discovery in this case, because now they're talking about Devereaux's entire organization, not just what happened in a particular facility with Roe himself, one facility. We have 21 of them across the country in 13 states. Now, we're talking about the entire country for discovery and it will exponentially increase obviously the cost of litigation for the parties, particularly for my

client, I mean, exponentially.

So we feel it is consistent with the federal court philosophy of trying to create efficiency, resolution of cases to look at this now and consider the question at least, at least consider the question, is there any discovery here that could permit this to be certified under any circumstances.

And I'd like to tell you a few things why I think it won't. Number one, many circuit courts have noted that Wal-Mart was a gamechanger in terms of certifying class actions. And Wal-Mart teaches us that the district court has to perform a quote, rigorous analysis of the claims and defenses and the elements of the causes of action that are being offered to support class action treatment. Well, you can't do that here.

And the reason you can't do it here is because the only count that is mentioned as a class action is Count XI of the Roe complaint, which is a count and a cause of action labeled injunctive and equitable relief. And we have pointed out there is no cause of action, it is a remedy, not a cause of action.

They have acknowledged that and said okay, but then argued but all our other counts are incorporated by reference anyway, so the entire complaint is being offered as a basis for class action treatment.

The reason that's an absurd argument is, and this gets back to what I said earlier, there's no actual injury being pled in Roe for the class, none. They make it clear over and over again. The injury is the heightened risk of harm. That's the injury.

Well, you have common law torts here. For example, assault and battery, intentional infliction of emotional distress. You cannot state those for heightened risk of harm. You need an actual battery, not a risk of battery. There's no such claim that I had risk of battery.

You can have a battery if you were actually battered, but you can't have a heightened claim of battery. The same with intentional infliction of emotional distress, the same with negligence frankly in Pennsylvania, the same with all the common law torts.

And let me say, Your Honor, they have not identified a single case in all their briefing where a class was certified based on common law torts. And that's what we have here. We don't have a statute or a constitutional mandate that is being argued that objectively was violated.

They don't have a single case that they put forth, we can't find one, where a class was certified just based on common law torts.

THE COURT: But it's not -- there's no articulation that that would be precluded, is there?

MR. LUTSKY: No. But the reason it's not done is because you can't make the elements of (indiscernible) --

THE COURT: Okay. Okay.

MR. LUTSKY: (indiscernible). So for example, the most important question for me in addressing -- and I'll try to keep it shorter, in addressing certification is, and this is the Wal-Mart's instruction. When you look at the causes of action that support class action treatment as they pled, and we think it was only one count and that's not even a cause of action, but when you look at it, what you have to ask yourself is, is there a common question whose answer, and the operative word there is answer, whose answer will drive the litigation to resolution. That's the biggest issue in class action certification. We don't have that here.

What they've said is, everybody has a heightened risk of injury because of either no policy or bad influence in the policies. That is not a common question whose answer would drive the litigation. And there are cases we have cited, Stupenberg (ph) from the Fifth Circuit, DL v The School District of the District of Columbia which tried to do the same thing they're doing,

except not in torts, but through statute, all of those cases allege there was systematic failures.

THE COURT: Is that in the motion to dismiss stage?

MR. LUTSKY: Yes. No. It was done (indiscernible).

THE COURT: Yeah.

MR. LUTSKY: But the principles are the same. So if you have a case like this one where they're alleging we have systematic failures, they don't identify a single injunction that they're requesting. They identify ten subject areas for injunctions to be created presumably through experts. That's exactly what the Fifth Circuit in Stupenberg said is completely contrary to Wal-Mart. You need a specific course of conduct and specific relief that either all of the class gets or none of the class gets. It has to be done in the same stroke.

You cannot have ten different subject matters ranging from hiring to supervision to how we lay buildings out, to video monitoring, to investigative responses, that can never be certified as a class because it doesn't follow along. It doesn't follow with the United States Supreme Court's decision that you have to have a specific injunction from an answer to a common question which resolves litigation and provides relief to all or provides

relief to none.

This is very much like what happened in the Fifth Circuit in Stupenberg and the Gill (ph) case. And both of those cases completely rejected the idea of certification.

Now, they do cite to the Baby Neal (ph) case in the Third Circuit, that was (indiscernible). In fact, it was 20 years pre (indiscernible). And it has very little value today because before Wal-Mart and maybe Your Honor will remember this, because I know you've been on the bench a long time, before Wal-Mart it was not that difficult to certify a class based on a common question. But the Supreme Court completely changed that.

THE COURT: But then the question is whether -- you know what my issue would have to be, whether I follow the Third Circuit or the Supreme Court. I know that's the $64,000 question.

MR. LUTSKY: I think all the circuits and all the district justices have to follow the Supreme Court (indiscernible).

THE COURT: Well, no, but whether I -- that would have to happen in the context of the Third Circuit, but not in the context of the --

MR. LUTSKY: Well, and I would suggest to Your Honor respectfully if Baby Neal came up today, after Wal-

Mart decision --

THE COURT: I --

MR. LUTSKY: -- it would've been decided completely differently.

THE COURT: All right. Okay.

MR. LUTSKY: So you didn't have any single question here that can certify a class, none. And especially when you wanted (indiscernible) common law torts involving hundreds of thousands if (indiscernible) you know at least 25,000 people who'd be in service today by 7,000 different people, you are not going to find the commonality that you need to certify a class.

And let me just say one more thing about this, because I know Your Honor wants me to keep this quite short. This is a 23(b)(2) class, which is injunctive relief only. No claim here for monetary damages. And we've made an argument that Roe is not a typical plaintiff because he's making a claim for money damages, but I'll leave that to the (indiscernible). I'll put that aside.

But in a 23(b)(2) class, there is no opt out available to the class members. They have no right to opt out. They are bound by the decision. So if they get an unfavorable result, it's too bad and they can't come forward later with their claims.

And because of that, Courts take great care in

23(b)(2) cases particularly to make sure the class is cohesive and the commonality requirements are even that much more stringent in the 23(b)(2) as opposed to a monetary 23(b)(3) case.

There is no discovery here that will ever take place that will allow you to consider certifying a class. The only result will be that we will spend hundreds of thousands of dollars of wasteful discovery that will lead to nothing. And that's why I ask the Court to at least consider the issue at the pleading stage, and cases in this courthouse and in other federal courts of Pennsylvania have done that.

Judge Winer (ph) did it here when he considered the fact that in a discrimination case, it was never going to be certified because they were saying people being discriminated against for different reasons. It's the same thing here. Are they getting a heightened risk of abuse because the building is not properly laid out? Is it because the video system doesn't work right? Is it because you don't have a policy on supervision? Is it because you shouldn't have hired the person in the first place? This is not a class. This is a super allegation complaint.

THE COURT: I assure you that I will consider your very interesting argument.

MR. LUTSKY: Thank you, Your Honor.

THE COURT: Okay. Ms. Martin?

MS. MARTIN: Thank you, Your Honor. I agree with Your Honor this is premature just about --

THE COURT: I didn't say I thought it was premature.

MS. MARTIN: I think this is premature. I think the back and forth that we had in our briefing and that we're going to have right now just shows that there's a lot of discussion --

THE COURT: Well, his argument is that you will have absolutely no opportunity to certify a class, that there will be no -- there's no discovery that you can do that -- because he talks about extensive discovery. What are you telling me the discovery might unveil that would allow you to have a class certification?

MS. MARTIN: Certainly, Your Honor. What policies did they have, what do they look like, how are they enforced, how are they implemented. Centralized decision-making, who made the decisions, when they learned about abuse that happened, what did they do, what were their discussions, how did they decide whether to change their policies or not.

All these things are infinitely learned in discovery that will help us to answer the common questions

that we would love to brief on class certification, but did they have a duty to protect those students in their cases -- the (indiscernible) in their case. Did they protect duty? And did outreach of the duty cause the increased risk of abuse and assault to all of the current class members.

We do have an actual injury here. The injury is a heightened risk of abuse above the baseline that is in the public. It's similar to the kind of heightened risk that you see recognized as an actual current (indiscernible) injury that you see in (indiscernible) monitoring classes. Where the defendant's wrongdoing, those are tort cases as well, the defendant's wrongdoing has created an increased risk of a disease or some other kind of sickness, and that increased risk is a liability. That is an actual harm that everyone is suffering.

And you can look at that, take that all the way back, for example, Friends of All the Children versus Lockheed where you had the children coming from Vietnam and the plane lost pressure, and all those children were then at an increased risk for follow-on illnesses and injuries related to the severe loss of pressure that happened when they were being evacuated from Vietnam.

Many other medical monitoring cases, that was from the (indiscernible) court but moving forward to the

present day. So that's an example of the kind of situation where you have an increased risk. Yes, it's a risk, but this isn't a speculative fear of harm, this is an actual increased risk that is measurable that affects everybody that's there now, that that is avoidable. And that if they do implement reforms and we don't know what those are yet, (indiscernible) but if they do implement reforms, that increased risk over the baseline is you can't eliminate it, and you can't fix that for everyone across the board, one (indiscernible).

It's true that in our briefing we do have a number of different options that we put in there that could be things that we might need to be doing, to address the issues. The problem is we don't know exactly yet what is wrong with their policies and their enforcement and their decision-making.

All we know, Your Honor, is that something has gone terribly wrong, because the abuse is rampant, it's everywhere, it's normalized, it's baked into the culture. So we need to find out in discovery what are the policies, (indiscernible) the policies, how are they informed -- enforcing them, what's the (indiscernible) making with the knowledge that they do have. That's the kind of stuff that will lead to the answers to the common question that drive duty and breach and causation for the entire class

with regard to the injunctive relief claimed.

Certainly the damages is different but damages is looking back. What happened and how can we compensate what happened in the past versus what is happening now and how we prevent in the future.

And so that's the reason why the argument that my colleague made about, at the very end there, about how -- and its in his briefing as well, if there is a ruling on injunctive relief that would somehow bind this class so that they will be unable to bring damages claims in the future, this has nothing to do with damage claims.

An injunctive relief ruling will not have anything to do with their ability to bring damage claims for past harm, this is talking about harm that is affecting them right now as we sit here. All the children are in Devereaux's care are facing this increased risk above the baseline right now, and this is about what we can do to change that so they are not facing that risk.

THE COURT: Okay. Thank you. Now, do you want to respond?

MR. LUTSKY: Briefly.

THE COURT: Yeah, okay. And I'll give you a chance to answer. One second.

Oh, yeah, okay.

MR. LUTSKY: Your Honor --

THE COURT: Oh, yeah, I'm going to have one more issue, thank you.

MR. LUTSKY: Thank you. I want to respectfully suggest that counsel just made my argument for me, that this will never be a class no matter what happens in discovery. She said the common question to be answered is did they have a duty, did they breach it. That's not a common question for class action certification.

Did they have a duty and did they breach it? How did they breach it? Did they have buildings with blind spots? Did they not have a video system that was everywhere, did they not hire the right people, did they not supervise the right people, did they not retain the right people, did they not investigate appropriately.

She's making my argument. This is not a case for which discovery will ever be (indiscernible) certified and common questions whose answer will resolve the class ever. And she's absolutely just made the argument I've been arguing for the past ten minutes.

This is about 10 or 12 different subject matters. In fact, I was also (indiscernible) to hear they even know what policies we have. I mean, that to me sounds like a fishing expedition and I'm not making any personal argument on it.

But they don't even know what we have, they just

know that they have to get in there and look. That's not a class. A class requires a common question and it requires a specific injunction, not 10 to 12 subject matters you want to then prep injunctions for later, which are not cohesively tied together. This is -- I don't know how to say it any better than she just said. It's never going to be a class.

THE COURT: Okay. One second. Do you want to -- no, I want to speak with my law clerk a second.

(Pause)

THE COURT: Okay. All right. One second.

(Pause)

THE COURT: All right. The one claim that I do have -- that I had delineated in my own -- with my own notes is the claim of the statute of limitations in Jines and whether or not it's a susceptible to fraudulent concealment. Do you have -- are you prepared to argue that? Okay. I'm going to allow the defense to tell me why you think that -- I understand the facts of that pretty clearly. Okay.

MR. LUTSKY: This is a claim that they -- this is plaintiff time at statute --

THE COURT: Yes.

MR. LUTSKY: -- that we're talking about. This is a claim that arose I think they said between 19 --

THE COURT: I have it Kahn and Jane Doe 4.

MR. LUTSKY: Jane Doe 4 I believe --

MS. MARTIN: Jane Doe was voluntarily dismissed.

THE COURT: Oh was it, okay?

MR. LUTSKY: We're just talking about Kahn.

THE COURT: All right. Okay.

MR. LUTSKY: This is allegedly a claim of abuse about -- over medication not sexual abuse.

THE COURT: Uh-huh.

MR. LUTSKY: Over medication in 1976 or thereabouts.

THE COURT: Uh-huh.

MR. LUTSKY: As I recall the briefing. So we're talking about more than 45 years ago. An individual who actually fled the institution and escaped because he wasn't happy with the way in which they were handling, including this over medication allegation.

This is not a case of tolling the statute of limitations. There are no acts which they have alleged to a place within the statutory period. This claim has been time barred for probably 35 or so years. There's no recent acts that have been alleged, and there was no reason for Mr. Kahn not to know what he believed he had suffered for what he had received in medication from Devereaux.

I don't know if this is a repressed memory case, it didn't say that, I don't know if it's that, I don't know if it's a case where he claims, apparently he claims that once he read about their culture in the newspaper he now decides that what they did was abuse. Before he didn't really know that, but when he hears about the newspaper he decides well, must have been abuse.

I mean, this is a textbook claim of statute of limitations. There's nothing that's happened within the statutory period to keep it alive.

THE COURT: Thank you. What happened in the statutory period that would keep it alive?

MS. MARTIN: As far as Kahn knew what's happening to him was treatment, it wasn't abuse. If I could use the (indiscernible) to a stupor, he did not understand that that was abuse and he did not understand that for many, many years, and he suffered as a result of that drug use.

Now, a couple of things. The first is that fraudulent concealment exists where one is told that pain was part of the normal healing process, that's directly from the Third Circuit case Bellis v Beloff (ph) and that's exactly what happened with Kahn. He was told what was happening to him was part of his treatment.

The fact that he ran away because he found it

unpleasant, doesn't mean that he was aware that he was being abused, or that he had a cause of action. With a child who's going to get chemical therapy, it's likely that that child would be suffering, would not like what was happening to her, and might even run away trying to escape the treatment. That doesn't mean the treatment is abuse.

So -- and in particular, in this, in the Eastern District of Pennsylvania there was a case where the Court found that fraudulent concealment applied where the plaintiff's (indiscernible) disabilities were caused by the drugs that were prescribed and administered to the plaintiff by the defendant as part of the therapy which the plaintiff proved was negligent.

So that the entity that prescribed the drugs that said it's part of treatment, and then used that same argument to say that the statute of limitations bars the claim, the institution can't do that, that's fraud. The institution has lied to the individual and has made it impossible for the individual to know exactly what happened to him was abuse.

Now, in terms of what's happened in the time period, my colleague is exactly right, until the expose came out about Devereaux, my client did not know that what had happened to him was abuse. He thought it was

unpleasant treatment, he knew that there were effects of it, but he didn't know that it was abuse. And this case is completely different than other cases like Rice where the individual understood that what had happened to her was abuse. That's not this case. They didn't understand -- Kahn did not understand that he had been abused.

And another point that's in our complaint, Your Honor, is that Kahn now knows that he is sterile. And he believes the fact that he's sterile and can't have children is due to the rampant drugs that he was prescribed at Devereaux and the aftereffects. This is something that Kahn couldn't have known until recently.

THE COURT: Okay.

MR. LUTSKY: I'd also like to point out that Mr. Kahn was a resident in Pennsylvania and also I think in Texas at times with Devereaux, and obviously the statute of limitations, Your Honor, is a state law concept. And the Supreme Court of Pennsylvania addressed this very issue this year in the Rice case where they denied the plaintiff's argument that the statute was tolled because he didn't know about his -- that his abuse was really abuse until he read a grand jury report.

Similar to the argument that they're making here that he didn't understand it was abuse until he read a newspaper article about others, not about him, because

there was no mention of him in any of the newspaper articles, but he read it about others.

And I think what this (indiscernible) of Pennsylvania, which his the last word from the Pennsylvania statute of limitations what they said here in Rice is important. They said because there was no pleading, no facts pled that the plaintiff had made reasonable efforts to inquire into his injuries, that the judgment on the pleadings was warranted for the defendant.

There are no facts pled here that Mr. Kahn did anything. Now, he may have only recently realized he was sterile. He may believe it's from the drugs, although it's not clear that they're alleging it was at all, but he had lifelong injuries being alleged here. He certainly knew he was injured, in fact, he knew he was being mistreated in his mind because he ran away.

But he's alleged lifelong injuries and there's no facts pled, none, that he took any steps to inquire, make a reasonable inquiry as to whether or not he had been abused. And the fact that you wake up one day and read a newspaper article about what happened to other people that's too late. And that's exactly what happened in Rice with the (indiscernible) and the Supreme Court of Pennsylvania said that's insufficient. And they did, as a matter of law, grant judgment on the pleadings.

THE COURT: Okay.

MS. MOLDOVAN: If I may --

THE COURT: Yes.

MS. MOLDOVAN: -- (indiscernible) about Rice?

THE COURT: Yes.

MS. MOLDOVAN: If you look at Rice it's a different situation. Rice said that she wasn't aware that other people were being abused. She specifically said that she was told by the Diocese that quote, this was an isolated event. Rice knew that she was being abused. Rice did not know the extent of the cover-up of the abuse. That's different from what we're arguing.

We're arguing that Kahn did not know that he was being abused. So this case is not the same thing as Rice. And the other point I just want to make is that reasonable diligence is required, but reasonable diligence takes into account the plaintiff's mental disabilities.

So it's not your average person and whether or not they try to understand. Reasonable diligence has to take into account who the person is and what that person has gone through.

THE COURT: Okay.

MS. MOLDOVAN: Thank you, Your Honor.

MR. LUTSKY: Just very briefly. But what Rice teaches us is you have to allege facts that show their

reasonable diligence and there are none here, there's absolutely nothing in the complaint about that. And counsel made reference to --

THE COURT: Statute of limitations is affirmative defense.

MR. LUTSKY: Yes, but as a matter of law it can be granted when it's clear on the face of the complaint that their claim is time barred. It's (indiscernible).

THE COURT: Yeah, okay.

MR. LUTSKY: And there was none in Rice on the judgment on the pleadings, not a --

THE COURT: Well, judgment on the pleadings is a little different.

MR. LUTSKY: Well, it's a matter of law, it wasn't a fact based inquiry. It wasn't a summary judgment motion. It was done on the judgment on the pleadings, the pleadings themselves. I don't think that's very different than 4(b)(6) motion.

But, you know, counsel has made reference well, the day to, you know, there were cases in the '90s, cases in the '80s and there was a Georgia case, apparently none of this woke up Mr. Kahn. The only thing that woke up Mr. Kahn was a 2020 newspaper article of the Enquirer. And again, no facts are pled here to suggest he did anything to try to determine if he had a claim.

THE COURT: Okay. Thank you very much. Okay. Very interesting argument and I appreciate your coming. Do you --

MS. MARTIN: Just briefly, one housekeeping, Your Honor.

THE COURT: Yes, I have housekeeping too.

MS. MARTIN: Okay.

THE COURT: No, your housekeeping comes first.

MS. MARTIN: Sorry, Your Honor. So I just wanted to let the Court know this was just to update the Court, it's not (indiscernible) to Devereaux that Devereaux released our plaintiff Roe from a Devereaux facility on August 12th. So he is no longer at the Devereaux facility. So I just wanted the Court to be aware of that.

THE COURT: But he was at the time of the --

MS. MARTIN: Yes, Your Honor, he was there --

THE COURT: So you're talking about an injunction.

MR. LUTSKY: Yes, that's the only -- that's the request for a class cases is injunction and it's black letter law, you can't (indiscernible) injunction you have no standing if you're not there, so how does that go forward?

MS. MARTIN: So, Your Honor, first of all

Devereaux's waived this argument by failing to include it in any of their briefing. They've known this, they released him. So they've lost their shot (indiscernible) first of all.

Second of all, you know, from our standpoint it doesn't make any difference to the classic situation of, you know --

THE COURT: So is it an injunction perspective?

MS. MARTIN: Sure, yeah, but it's (indiscernible) from the time of filing of the complaint he was at Devereaux at the time of the filing of the complaint. This is a class situation of capable repetition (indiscernible) if Devereaux wants to, they can release every plaintiff that we have and just keep releasing them, that's not a (indiscernible).

I'm happy to brief this, Your Honor, if they are trying to make an argument on this right now. I'm just trying to inform the Court of something that they already knew.

THE COURT: Well, I think it's best, you have to -- if you object to that, they've now informed you, which you should have known in the first place, which I'm sure you probably do.

MR. LUTSKY: No, I didn't. The first time I've ever heard of this was right here.

THE COURT: Oh, okay, all right. That this is not a valid claim now that he's released.

MR. LUTSKY: Not for a class. You can't get an injunction if they're not there.

THE COURT: Okay.

MR. LUTSKY: I mean, I'll tell Your Honor that that's exactly the reason why the Jines case, which included a class when it started, the class was withdrawn because none of the reps is still there. I mean, this is black letter law.

THE COURT: I don't rule from the bench even on black letter law.

MR. LUTSKY: We're happy to brief it.

THE COURT: Okay.

MS. MARTIN: Your Honor, (indiscernible) brief it, I'd like to also be allowed to brief the waiver issue.

THE COURT: Okay. Of course, you can brief it. Any response that he's going to present, you certainly can brief.

MR. LUTSKY: (indiscernible)

THE COURT: Well, you'll have a date. You're now -- it's in your court, of course it's my court, but it's in your court to -- you now know the information if you believe that it should be dismissed, you have to -- you would have to be your motion.

MR. LUTSKY: In light of the holidays --

THE COURT: That's okay. I'm not going to -- when you bring it up?

MR. LUTSKY: Yes.

THE COURT: If you don't bring it up in a reasonable period then I will --

MR. LUTSKY: Would the middle of January be a fit?

THE COURT: I have no problem with that.

MR. LUTSKY: Would that be fit, the middle of January?

MS. MARTIN: Every single (indiscernible) for response and reply?

MR. LUTSKY: Sure. Whatever you need.

MS. MARTIN: Sure.

THE COURT: Okay. All right. Thank you.

All right. I'm -- I'll rule on the motions and thank you for a very interesting oral argument.

MS. MARTIN: Thank you, Your Honor.

MR. LUTSKY: Thank you, Your Honor.

THE COURT: Hold one second, off the record.

(Proceedings concluded at 12:09 p.m.)

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C E R T I F I C A T I O N

I, Sheila Orms, Court approved transcriber, certify that the foregoing transcript is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

_____ January 5, 2022